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In The
Supreme Court of the United States

October Term, 1992

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STATE OF SOUTH DAKOTA IN ITS OWN BEHALF,
AND AS PARENS PATRIAE,

Petitioner,

v.

GREGG BOURLAND, PERSONALLY AND AS
CHAIRMAN OF THE CHEYENNE RIVER SIOUX
TRIBE, AND DENNIS ROUSSEAU, PERSONALLY
AND AS DIRECTOR OF CHEYENNE RIVER SIOUX
TRIBE GAME, FISH, AND PARKS,

Respondents.

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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**BRIEF OF *AMICI CURIAE* STATES OF MONTANA, ALABAMA,
ARIZONA, CALIFORNIA, NORTH DAKOTA, UTAH AND
WASHINGTON IN SUPPORT OF PETITIONER**

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The States of Montana, Alabama, Arizona, California, North Dakota, Utah and Washington, through their respective Attorneys General, respectfully submit a brief *amicus curiae* pursuant to S. Ct. R. 37.2 in support of the petitioner.

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INTEREST OF THE *AMICI* STATES

Each State appearing as an *amicus curiae* has one or more Indian reservations within its boundaries. These reservations were created initially as areas where the affected tribe's members would have exclusive occupancy rights. Subsequent federal legislation, however, has eliminated that exclusivity in most instances. It is thus quite common for substantial amounts of reservation land to be owned not only by nonmembers but also by federal, state and local governments. The complex land ownership and demographic patterns now characterizing many reservations raise difficult questions concerning the extent to which tribes may exercise regulatory authority over the use of those lands by nonmembers. The Court of Appeals' decision, although dealing specifically with hunting and fishing regulation, has far broader civil regulatory implications for the *amici* in their efforts to fashion coherent responses to those questions.

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SUMMARY OF THE ARGUMENT

A tribal right to regulate can have one of two sources: positive federal law or a tribe's retained inherent authority. The Court of Appeals implied from the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635 (1869), a right on behalf of the Cheyenne River Sioux Tribe to regulate non-

Indian reservation hunting and fishing. The Court of Appeals' reasoning, however, ignored the Treaty's literal language which, in relevant part, established only a geographical area in which the Tribe was to have exclusive occupancy rights and effectively expanded traditional, but limited, landowner rights to incorporate notions of tribal sovereignty. No regulatory powers were granted to the Tribe under the Treaty.

Even if the Court of Appeals properly implied a grant of tribal regulatory authority from the Fort Laramie Treaty, that authority emanated from the Tribe's territorial exclusivity right with respect to reservation lands. The Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), unambiguously effected a cession of all real property ownership rights, except those relating to mineral estates, to the United States for the purpose of creating a reservoir and adjacent shoreline to which the federal government, not the Tribe, would control access by nonmembers. Under these circumstances, the Court of Appeals' conclusion that a treaty-secured power to regulate non-Indian hunting and fishing continues within the area taken under the Cheyenne River Act runs directly counter to the principle that a lesser included power may not survive the termination of the greater power. *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408, 424 (1989); *Montana v. United States*, 450 U.S. 544, 559 (1981).

Determining the scope of inherent tribal authority requires analyzing the status of the two-pronged *Montana* test in light of *Brendale*. The District Court applied the *Montana* test and concluded that, with respect to the tribal lands taken under the Cheyenne River Act and nontribal lands taken under the Flood Control Act of 1944, Pub. L. No. 78-534, 58 Stat. 887, the Tribe's political integrity, economic security, or health or welfare was not imperiled

by the lack of tribal authority over non-Indian hunting and fishing. Should the Court of Appeals' conclusion concerning the existence of a treaty-secured regulatory right and that right's nonabrogation be reversed, the District Court's findings are determinative even if, under *Brendale*, the latter court should have first inquired into whether the affected tribal interests were subject to protection only through nontribal administrative or judicial proceedings. However, if the Court of Appeals' analysis as to the existence and nonabrogation of a treaty-conferred regulatory power is sustained, its remand order with respect to the nonmember land taken under the Flood Control Act should be reversed since, under the reasoning in Justice White's plurality opinion in *Brendale*, the second *Montana* exception provides no basis for rebutting the ordinary presumption that tribes lack inherent authority over nonmember conduct on nontribal lands.

ARGUMENT

A tribal right to regulate can have one of two sources: positive federal law or a tribe's retained inherent authority. A careful analysis of the treaty rights afforded the Cheyenne River Sioux Tribe in the Fort Laramie Treaty of April 29, 1868 ("1868 Treaty"), 15 Stat. 635 (1869), the effect of the Cheyenne River Act, Pub. L. No. 83-776, 68 Stat. 1191 (1954), on those treaty rights, and the extent of the Tribe's inherent sovereign authority requires reversal of the Court of Appeals' judgment.

I. THERE IS NO POSITIVE FEDERAL LAW WHICH PROVIDES AUTHORITY FOR TRIBAL REGULATION OF NON-INDIANS WITHIN THE TAKEN AREA OF THE OAHE RESERVOIR.

A. The 1868 Treaty Does Not Confer Upon the Tribe the Right to Regulate the Hunting and Fishing of Non-Indians Within the Reservation.

The 1868 Treaty created one reservation for various tribes of the Sioux Indians, including the Cheyenne River Sioux Tribe ("Tribe"). In 1889 this reservation was divided into six separate reservations, one of which was set aside for the Tribe. Act of March 2, 1889, 25 Stat. 888. Neither the Treaty nor the 1889 Act expressly provides that the Tribe has the right to regulate any nonmember activity within the Reservation. As a consequence, the Court of Appeals began its analysis where it left off in *Lower Brule Sioux Tribe v. South Dakota*, 711 F.2d 809 (8th Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984). *South Dakota v. Bourland*, 949 F.2d 984, 990 (8th Cir. 1991) (Pet. App. at A-20). In *Lower Brule*, the court held that a federal treaty setting aside a reservation for the use and occupation of a tribe preempted state jurisdiction over Indian hunting and fishing on the reservation and that, when Congress established the Lower Brule Reservation, the Tribe acquired the right to hunt and fish on the reservation free of state law. *Lower Brule*, 711 F.2d at 814-15. The court found that the Fort Randall Act, Pub. L. No. 85-923, 72 Stat. 1773 (1958), and the Big Bend Act, Pub. L. No. 87-734, 76 Stat. 698 (1962), which authorized the acquisition of and payment for tribal and trust lands on the Lower Brule Reservation needed for the Big Bend Dam and Reservoir Project, did not diminish the Lower Brule Reservation or effect an abrogation of the Lower Brule Tribe's treaty right to hunt and fish on the taken lands free of state regulation.

The Court of Appeals below, without pausing to distinguish the different issues presented, applied the same canon of construction used in *Lower Brule*: "[T]ribal rights are abrogated only if Congress 'has clearly expressed its intent to do so[.]'" *Bourland*, 949 F.2d at 990 (Pet. App. at A-22). Its approach necessitated an initial determination of what rights were secured by the 1868 Treaty. This Court recognized in *Montana v. United States*, 450 U.S. 544 (1981), that a territorial exclusivity provision in the Fort Laramie Treaty of May 7, 1868, 15 Stat. 649 (1869), which is identical to language in the 1868 Treaty, accorded the Crow Tribe "the sole right to use and occupy the reserved land, and, implicitly, the power to exclude others from it" and "arguably conferred upon the Tribe the authority to control fishing and hunting on those lands." *Id.* at 554, 558 (emphasis supplied). The Court of Appeals construed this statement in *Montana* as establishing that the 1868 Treaty conferred on the Tribe "an exclusive right to control hunting and fishing on the Reservation" -- a right which it could find abrogated only if "Congress clearly expressed an intent to divest the Tribe of [such] regulatory authority[.]" *Bourland*, 949 F.2d at 991 (Pet. App. at A-24, A-27). The Court of Appeals' determination that the Treaty established a freestanding right to regulate non-Indian hunting and fishing on reservation lands is wrong for two reasons.

First, and most importantly, there is no textual basis for the Court of Appeals' conclusion. The only relevant provision of the Treaty states that reservation lands were set aside "for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them." 15 Stat. at 636. No other persons, except specified government officers or

agents, were "ever [to] be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians." *Id.* Rather than constituting ground upon which to pitch a claim for treaty-conferred regulatory power, the territorial exclusivity provision militates foursquare against such a result. It is clear, when negotiated, the Treaty anticipated that non-Indians, other than a select few, would not have access to the reservation and that those who were authorized to enter would be federal representatives over whom the Tribe presumably lacked jurisdiction. See, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831); *United States v. White Mountain Apache Tribe*, 784 F.2d 917, 919-20 (9th Cir. 1986). Crediting the Court of Appeals' implication of regulatory authority from the territorial exclusivity provision would thus countenance "a glaring inconsistency in the overall Treaty structure" (*Oregon Department of Fish and Wildlife v. Klamath Indian Tribe*, 473 U.S. 753, 770 (1985)).¹

¹This Court has implied certain usufructuary rights from treaties or statutes creating reservations for the exclusive occupancy of Indians. E.g., *United States v. Dion*, 476 U.S. 734, 738 (1986) (hunting and fishing rights); *Winters v. United States*, 207 U.S. 564, 575-77 (1908) (water rights). The Court has never implied, however, a treaty right to regulate nonmembers from a territorial exclusivity or any other provision. See n.2, *infra*. The absence of decisional authority for the latter proposition is not remarkable, since implication of the usufructuary rights was viewed as essential to carrying out reservation purposes and since post-Civil War reservations generally, and specifically the Great Sioux Reservation, were established to insulate tribal members at least for a period sufficient for them to acquire agrarian skills which would facilitate integration into nontribal society. See F. Prucha, *The Great Father* 562-81, 631-40 (1984).

Second, implying the right to regulate nonmember activity from a territorial exclusivity provision such as that in the 1868 Treaty confuses tribal sovereignty principles with ordinary incidents of landownership. As the Court made explicit in *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 145-46 (1982), a tribe's governmental powers are distinct from its capacity as a "commercial partner": "It is one thing to find that the Tribe has agreed to sell the right to use the land and take from it valuable [resources]; it is quite another to find that the Tribe has abandoned its sovereign powers simply because it has not expressly reserved them through a contract."² The mere fact that

²The debate in *Merrion* concerned whether the source of a tribe's inherent power over a nonmember extracting reservation oil and gas pursuant to a tribal lease was premised solely on the right to exclude or on a more broad conception of inherent authority. E.g., 455 U.S. at 142 ("[The] limitation on tribal taxing authority exists not because the tribe has the power to exclude nonmembers, but because the limited authority that a tribe may exercise over nonmembers does not arise until the nonmember enters the tribal jurisdiction. We do not question that there is a significant territorial component to tribal power: a tribe has no authority over a nonmember until the nonmember enters tribal lands or conducts business with the tribe"). This debate continued, in the context of a treaty rather than an Executive Order reservation, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. 408 (1989), where Justice Stevens again relied on the power to exclude as the basis for finding tribal regulatory power over certain lands. As in his *Merrion* dissent, Justice Stevens viewed the power to exclude as inherent. *Id.* at 435 ("[e]ven in the absence of a treaty provision granting such authority, Indian tribes maintain the sovereign power of exclusion unless otherwise curtailed"). He nonetheless added that under the 1855 Treaty between the United States and the Yakima Nation, 12 Stat. 951 (1859), this inherent power "was confirmed." *Id.*

(continued...)

governmental action has established a geographical area for exclusive tribal occupancy and, in so doing, created certain protected property interests carries with it no suggestion that such interests were to encompass not only traditional ownership rights but also, by implication, federally-conferred authority to regulate non-Indians entering such area. Thus, while "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property'" (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982)), the right to exclude does not in itself give rise to regulatory jurisdiction of the kind sustained below. That jurisdiction, if it is to be found, must be predicated on a tribe's inherent sovereign powers existing independently of the territorial exclusivity provision.

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²(...continued)

Despite his reference to such confirmation, it appears that the regulatory authority found by Justice Stevens to exist with respect to the Brendale property emanated from inherent, not federally-conferred, tribal power since there would exist no reason to confer that which already existed.

B. Even If the Court of Appeals Properly Implied a Right Under the 1868 Treaty to Regulate Non-Indian Hunting and Fishing, This Right Cannot Survive Elimination of the Primary Right to Exclude.

In *Montana* this Court recognized that, even if the territorial exclusivity clause of the second 1868 Fort Laramie Treaty "arguably" conferred regulatory authority on the Crow Tribe, tribal authority "could only extend to land on which the Tribe exercises 'absolute and undisturbed use and occupation.'" 450 U.S. at 559. Nothing in *Montana* supports the notion that, for purposes of determining whether a regulatory right implied from the promise of territorial exclusivity has been abrogated, a clear intention to abrogate the implied right must appear in the legislation or legislative history eliminating the territorial exclusivity entitlement itself. Justice White, in *Brendale v. Confederated Tribes and Bands of Yakima Indian Nation*, 492 U.S. at 424, cited *Montana* for the dual propositions that treaty-secured rights "must be viewed in light of the subsequent alienation of those lands" and that there exists no "power, derived from the power to exclude, to regulate activities on lands from which tribes can no longer exclude nonmembers." Moreover, nothing in *Montana* or its discussion in *Brendale* indicates that the existence of a treaty-secured regulatory power is dependent upon the manner in which the nonmember-owned lands were removed from trust status. The discussion of the Allotment Act statutes in those decisions stems only from the fact that the lands at issue passed out

of the public domain pursuant to statutes adopted during the allotment era.³

The Cheyenne River Act, Pub. L. No. 776, 68 Stat. 1191 (1954) (Pet. App. at A-195), provided for the conveyance to the United States of "all tribal, allotted, assigned, and inherited lands or interest within said Cheyenne River Reservation belonging to the Indians of said reservation" required for the reservoir created by the Oahe Dam. *Id.* (Pet. App. at A-196). Section X of the Act further provided that the members of the Tribe will have "the right of free access to the shoreline of the reservoir including the right to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States." *Id.* at 1193 (Pet. App. at A-205). No question exists that the Act abrogated the Tribe's right to territorial exclusivity over the taken lands.

³Indeed, the Court's resolution of the streambed ownership with respect to the Big Horn River counsels directly against the Court of Appeals' reading of *Montana*. That issue was relevant because the Crow Tribe sought "to establish part of [its] claim of power to control hunting and fishing on the reservation by asking us to recognize [its] title to the bed of the Big Horn River." *Montana*, 450 U.S. at 550; *see also Brendale*, 492 U.S. at 443 (Stevens, J.) ("we held that the State owned the bed of the Big Horn River and thus rejected the Tribe's contention that it was entitled to regulate fishing and duck hunting in the river based on its purported ownership interest"). To credit the lower court's analysis would mean either that *Montana* did not resolve the issue of the Crow Tribe's power to regulate nonmember hunting and fishing on the Big Horn River or that the equal footing doctrine principles, upon which the streambed ownership question was resolved, have destruction of tribal governance as an important objective -- neither of which propositions is fairly tenable.

Since any possible implied treaty-right to regulate was dependant upon the right to the exclusive use and occupation of reservation lands, abrogation of the primary right to exclusive use and occupation eliminated any lesser included regulatory authority. *Brendale*, 492 U.S. at 424. Indeed, even the Court of Appeals has recognized that "the treaty right to exclusive occupation and use of reservation land is necessarily taken from an Indian tribe when a federal flood control project, which is also used for recreational activities by all persons, is constructed on the reservation." *Lower Brule*, 711 F.2d at 826. In such a situation, any tribal power to regulate non-Indians on the taken lands must come from inherent sovereign authority.

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II. INHERENT SOVEREIGN AUTHORITY IS NOT A BASIS FOR TRIBAL REGULATORY AUTHORITY OVER NON-INDIAN HUNTING AND FISHING WITHIN THE AREA TAKEN BY THE UNITED STATES FOR DEVELOPMENT OF THE OAHE RESERVOIR.

If this Court determines that the Court of Appeals incorrectly applied the treaty-abrogation analysis to the facts of this case, it need not address the question of the nature of the Tribe's inherent sovereign authority over non-Indians within the lands taken by the Cheyenne River Act. The District Court found that the *Montana* exceptions did not apply under the facts of the case and that, consequently, the Tribe's sovereign authority was not a basis for regulatory authority over non-Indians on lands taken by the United States pursuant to the Cheyenne River Act or on lands taken from non-Indians pursuant to the Flood Control Act. The District Court's findings as to the nonapplication of the *Montana* exceptions, which are

entitled to deference unless clearly erroneous (*Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985)), show unequivocally that no impairment of the Tribe's political integrity, economic security, or health or welfare had arisen by virtue of non-Indian hunting on all taken lands.⁴ Should this Court determine, however, that the Court of Appeals correctly applied the abrogation analysis with respect to lands taken under the Cheyenne River Act, the Tribe clearly lacks regulatory jurisdiction over lands taken under the Flood Control Act and the remand order below was improper.

The District Court's findings after trial concerning the second *Montana* exception were quite extensive. In part the district court determined: (1) "it does not appear that subsistence hunting and fishing is widely practiced by present Cheyenne River Sioux Indians" (Pet. App. at A-75); (2) "[t]ribal regulation of nonmember hunting on the taken area and nonmember fee lands is not necessary to protect hunting by tribal members for subsistence purposes" (id.); (3) "[t]he past subsistence needs of tribal members have been met despite nonmember hunting on the taken area and fee lands" (Pet. App. at A-77); (4) "[t]ribal regulation of nonmember fishing on the shoreline of the taken area is not necessary to protect fishing by tribal members for subsistence purposes" (id.); (5) "[g]enerally nonmembers hunting and fishing on the reservation have conducted themselves in a manner that does not threaten legitimate tribal concerns for livestock" (Pet. App. at A-78); and (6) "[i]n sum, the Tribe need not regulate the hunting and fishing activities of nonmembers on the taken area and the nonmember fee lands to protect its political integrity, economic security, or health or welfare" (Pet. App. at A-89). The District Court did not make any specific findings concerning the consensual-relationship exception, but no consent to tribal regulation appears to have existed as indicated by the trial court's ultimate conclusion that the Tribe lacked regulatory jurisdiction.

Approximately 18,000 acres of lands in the taken area were acquired from nonmembers under the Flood Control Act. The District Court considered this land, along with the land taken pursuant to the Cheyenne River Act, when making its determination that the Tribe's inherent authority did not provide a basis for regulatory jurisdiction over non-Indians. The Court of Appeals made the following comments in conjunction with its remand order:

Because the 18,000 acres within the taken area are in an "open" area, the analysis used by Justice White in his plurality opinion in *Brendale* should be applied to this acreage. According to Justice White's [*Brendale*] plurality opinion the 18,000 acres should be analyzed under the *Montana* standard. ... The District Court performed such an analysis of the taken area in whole, and found that neither of the exceptions to the general rule laid out in *Montana* applied. However, in light of our holding that the tribal defendants possess regulatory authority over the rest of the taken area, it would be appropriate for the District Court to again undertake a *Montana* analysis, limiting its inquiry to the 18,000 acres in question.

Bourland, 949 F.2d at 995 (Pet. App. at A-45 - A-46) (footnote omitted). The Court of Appeals misconstrued Justice White's plurality opinion in *Brendale*. The plurality opinion recognized the general principle that "regulation of 'the relations between an Indian tribe and nonmembers of the tribe' is necessarily inconsistent with a tribe's dependent status, and therefore tribal sovereignty over such matters of 'external relations' is divested. 492 U.S. at 427. It acknowledged the two possible exceptions to this general principle set forth in *Montana* but did not hold that the Tribe had a right to exercise regulatory

authority over any of the nonmember-owned lands at issue simply by meeting one of them. On the contrary, Justice White cautioned that the second *Montana* exception, prefaced by the word "may," indicates a "tribe's authority need not extend to *all* conduct that 'threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id.* at 428-29 (emphasis supplied). His plurality opinion then stated:

The governing principle is that the tribe has no authority itself, by way of tribal ordinance or actions in the tribal courts, to regulate the use of fee land. The inquiry thus becomes whether and to what extent the tribe has a protectible interest in what activities are taking place on fee land within the reservation and, if it has such an interest, how it may be protected. Of course, under ordinary law, neighbors often have a protectible interest in what is occurring on adjoining property and may seek relief in an appropriate forum, judicial or otherwise.

Id. at 430. The plurality opinion went on to determine that a "protectible interest" arises when the impact on the tribe is "demonstrably serious" and "imperils the political integrity, economic security or the health and welfare of the tribe." Justice White's opinion thus used the language of the second *Montana* exception as a standard for determining the presence of a protectible interest arising under federal law rather than as a standard which, if found, always gives rise to tribal regulatory power.

While *Brendale* involved the exercise of tribal regulatory authority in a zoning context, there is no principled basis upon which to distinguish it factually or legally from this matter. Here, as there, a tribe seeks to

regulate conduct of nonmembers on lands which it no longer owns for the purpose of protecting tribal interests; here, as there, the form of regulation sought to be imposed is one unquestionably within a state's traditional police powers; and here, as there, the need for tribal regulation would be coextensive only with the duration of the allegedly harmful conduct. *Brendale*, 492 U.S. at 429-30 (White, J.). Under these circumstances, Justice White's plurality opinion indicates that a tribe has no civil regulatory or adjudicatory authority but, instead, must pursue available nontribal administrative or judicial remedies to vindicate its protectible interests. The plurality opinion's reasoning forecloses any viable claim of tribal regulatory jurisdiction over non-Indian hunting and fishing on lands taken under the Flood Control Act.

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CONCLUSION

The *amici curiae* States respectfully request that the Court of Appeals' judgment be reversed.

Respectfully submitted,

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